

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
JULISSA INFANTE, as Parent and Natural :
Guardian of ELIJAH WILBORNE, an infant, :
and JULISSA INFANTE, individually, : 07 Civ. 846 (DLC)
Plaintiffs, :
:
-v- :
:
THE BRONX LEBANON HOSPITAL CENTER, JEAN :
TORNATORE, M.D., RACHANA GAVARA, M.D., :
CARLOS PENA, M.D., PHABILLIA AFFLACK, :
M.D., and HEIDI DUPRET, M.D., :
Defendants. :
:
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MEMORANDUM
OPINION & ORDER

Appearances

For Plaintiffs:
Philip Russotti
Wingate, Russotti & Shapiro, L.L.P.
420 Lexington Avenue, 2750
New York, NY 10170

For Defendant Bronx Lebanon Hospital Center [for the prenatal
care claims]:
Carolina A. Fornos
Assistant United States Attorney
Michael J. Garcia
United States Attorney for the Southern District of New York
86 Chambers Street, 3rd Floor
New York, NY 10007

DENISE COTE, District Judge:

Plaintiff Julissa Infante ("Infante"), individually and as
parent and natural guardian of an infant Elijah Wilborne, brings
this action for medical malpractice against defendants the Bronx
Lebanon Hospital Center (the "Hospital") and its employees for

negligent care Infante received during her pregnancy and labor and delivery. The United States moves to substitute itself as a defendant and to dismiss the complaint as to itself pursuant to Rule 12(b)(1), Fed. R. Civ. P. The motions, which are unopposed, are granted.¹

Background

The following facts are undisputed or taken from the complaint. Between October 1, 2004 and February 12, 2005, Infante received treatment at the Hospital during her pregnancy, labor, and delivery. On July 21, 2006, Infante filed this action in New York Supreme Court, alleging medical malpractice against the Hospital and its physician employees. The prenatal care Infante received was provided by the Women's Health Clinic at the Hospital. On January 15, 2007, Michael Garcia, the United States Attorney for the Southern District of New York, certified pursuant to 28 U.S.C. § 2679(d) that the Hospital was operating within the scope of its employment as an employee of the United States of America in connection with the prenatal care Infante received from the Women's Health Clinic. The certification as United States employees does not include,

¹ The plaintiff and United States explain that although the plaintiff was agreeable to filing a stipulation and order to dismiss the prenatal claims, the remaining defendants were unwilling to sign the stipulation.

however, the Hospital in connection with Infante's labor and delivery claims or the individual defendants. On February 5, 2007, the United States removed the action, and on March 12, filed the instant motions. Infante has submitted an affirmation in support of the motions.

Discussion

A. Substitution of the United States as a Defendant

The Federal Tort Claims Act ("FTCA") waives the United States' sovereign immunity for certain classes of tort claims. Celestine v. Mount Vernon Neighborhood Health Ctr., 403 F.3d 76, 80 (2d Cir. 2005). It also provides that district courts shall have exclusive jurisdiction over many types of tort claims brought against the United States if the injury in question was caused by "any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1).

The Public Health Service Act ("PHSA"), 42 U.S.C. § 201 et seq., makes the FTCA the exclusive remedy for actions against members of the Public Health Service "for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions." Id. § 233(a); see also Cuoco v. Moritsugu, 222 F.3d 99, 107 (2d Cir. 2000). Under the PHSA, the Secretary of Health and Human Services may deem health

centers that receive federal assistance and their employees to be employees of the Public Health Service. 42 U.S.C. § 233(g)(1)(A). When a tort action is brought against such designated employees, the United States Attorney for the district where the action is brought may certify that the health center or its employees were working within the scope of their employment at the time of the incident. 28 C.F.R. § 15.4(a); see also 28 U.S.C. § 2679(d). Upon certification, the case is removed to federal court, the United States replaces the named defendants as the liable party, and the case proceeds as an FTCA suit. See 42 U.S.C. § 233(c); Celestine, 403 F.3d at 80.

As already noted, United States Attorney Garcia has certified that the Hospital was working within the scope of its employment as an employee of the Public Health Service in connection with Infante's prenatal care. Having been properly certified, the motion to substitute the United States as defendant with respect to the prenatal claims is granted and this portion of the case proceeds under the FTCA.

B. Subject Matter Jurisdiction

Having been substituted as a defendant, the United States has moved to dismiss for lack of subject matter jurisdiction. A plaintiff bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. Aurecchione v.

Schoolman Transp. System, Inc., 426 F.3d 635, 638 (2d Cir. 2005).

The FTCA requires a plaintiff to exhaust all administrative remedies before filing suit. Celestine, 403 F.3d at 82. In order to pursue a claim under the FTCA, the plaintiff must have "first presented the claim to the appropriate Federal agency" and that claim must "have been finally denied by the agency in writing." 28 U.S.C. § 2675(a). The FTCA's exhaustion requirement "is jurisdictional and cannot be waived." Celestine, 403 F.3d at 82. Because Infante has failed to exhaust her administrative remedies, her claim relating to the prenatal care must be dismissed for lack of subject matter jurisdiction.

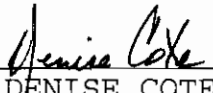
Conclusion

The United States' motion to substitute itself as the defendant Hospital in connection with the prenatal claims is granted. The motion of the United States to dismiss the prenatal claim against it for lack of subject matter jurisdiction is also granted. Because this case was removed from state court, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). As subject matter jurisdiction has not been alleged with regards

to the remaining claims and defendants, the remainder of the case is remanded to state court. The Clerk of Court shall remand the case.

SO ORDERED:

Dated: New York, New York
May 7, 2007



DENISE COTE
United States District Judge